SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 1 1970
E. ROBERT SEAVER, CLERK

No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1970

PAUL BENNETT BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
BEATRICE ROSENBERG,
ROBERT G. MAYBACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 555

PAUL BENNETT BIGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1970. On July 28, 1970, Mr. Justice Brennan ordered the time for filing a petition for a writ of certiorari extended to and including August 19, 1970. The petition was filed on August 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

404-342—70

QUESTIONS PRESENTED

1. Whether the government was required to register petitioner with the Selective Service System upon the willful refusal of petitioner to present himself for and submit to registration.

2. Whether the statutory requirement that petitioner, an alleged conscientious objector, register for the draft denied him free exercise of religion under the First Amendment or due process of law under the Fifth Amendment.

3. Whether the court below properly declined to review petitioner's contention, first raised in the court of appeals, that certain of petitioner's statements to investigating officers were inadmissible because they were made prior to the time he received *Miranda* warnings.

STATEMENT

After a jury trial in the United States District Court for the District of Oregon, petitioner was found guilty of failure to register with the Selective Service System, in violation of 50 App. USC 462. On October 29, 1969, he was sentenced to imprisonment for two years and fined the sum of $500. On February 24, 1970, after remand from the court of appeals, the district court modified the sentence and placed petitioner on probation for two years on the condition that he be employed with the Valley Migrant League, Woodburn, Oregon, for the period of probation. On appeal the conviction was affirmed (Pet. App. 1–3).

Petitioner lived within the District of Oregon during the period charged in the indictment (R. 14). He failed to register with the Selective Service System within five days after reaching his eighteenth birthday (August 24, 1968), as required by 50 U.S.C. App. 453 and by Presidential Proclamation No. 2799 (July 20, 1948, 13 F.R. 4173, 62 Stat. 1531) (R. 9–10, 44, 48). The reason given by petitioner at his trial was that as a Unitarian he was a conscientious objector to mass killing, and could not in good conscience participate in war in any form, even to the extent of registering (R. 44, 46).

On May 13, 1969, almost nine months later, FBI agents Echols and Knudson went to petitioner's home to inquire about his apparent non-registration with the Selective Service System (R. 16). When agent Echols asked petitioner if he was registered, petitioner replied that he was not (R. 17). At that point, Echols advised petitioner of his constitutional rights (R. 18). Petitioner was then asked if he was aware that he was in violation of federal law; he answered that he was aware some people considered this to be a violation of the law. When asked if he was willing to register with Selective Service, he responded: "emphatically no"[2] (R. 18–19). The FBI agents then left.

---

[1] "R" refers to the record which was before the court of appeals. As petitioner notes (Pet. 4, n. 2), in accordance with Rule 21 of the Rules of this Court, effective July 1, 1970, the record has not been forwarded from the Ninth Circuit.

[2] At the trial petitioner admitted that he knew he should have registered on August 30, 1968 (R. 47), but voluntarily decided not to register (R. 49).

Three days later, following his arrest for failure to register, petitioner was brought to the office of deputy marshal Bagley (R. 32). In response to questions, petitioner told Bagley the date and place of his birth, and his residence (R. 33). None of the law enforcement officers and no person connected with the Selective Service System made an effort to utilize this information to register petitioner. Apparently Selective Service System Form No. 332, notifying non-registrants of their duty to register (Pet. App. 8–9), was never sent to petitioner.

ARGUMENT

1. Petitioner contends that he was improperly convicted because the government (a) failed to comply with 32 C.F.R. 1613.11 and 1613.13 (Pet. App. 5–7) by not registering him involuntarily, using the information obtained by the law enforcement officers; and (b) failed to comply with 32 C.F.R. 1613.16 (Pet. App. 7) by not explaining to petitioner the penalty for failure to register and providing an opportunity for reconsideration (Pet. 7–12).

a. The government was under no obligation to register petitioner, who willfully refused to present himself for registration. Having failed to co-operate with the Selective Service System to provide the necessary information for his registration, petitioner cannot now escape the consequences of his intentional

non-registration by reference to 32 C.F.R. 1613.11 and 1613.13. These regulations, insofar as they provide for participation by the registrar in the registration process, apply only to a "registrant" who cooperates with his local board and willingly "present[s] himself for * * * registration." *Richter* v. *United States*, 181 F.2d 591, 594 (C.A. 9), certiorari denied, 340 U.S. 892. Nor does *United States* v. *Norton*, 179 F.2d 527 (C.A. 2), relied on by petitioner (Pet. 9), suggest otherwise. There, the registrant did present "himself at the office of the local board on the required date and talked courteously and at length with the chairman" (179 F.2d at 529). See also *Kaoheiaulii* v. *United States*, 389 F.2d 495, 497 (C.A. 9). Concededly, that is not the situation here (Pet. 4–5). Indeed, petitioner even admitted on several occasions that he did not want to be registered at all with the Selective Service System (R. 19, 48–49). In these circumstances, the government is under no duty to step in and register for him.

b. Moreover, as the court below correctly observed (Pet. App. 2–3), since petitioner at no time "presented himself for registration at the local board" he cannot now avail himself of 32 C.F.R. 1613.16, requiring an explanation to recalcitrant registrants of the penalty for failure to register, with an opportunity for reconsideration. In any event, at petitioner's initial interview with FBI agent Echols, the agent advised him

that his failure to register was a violation of federal law. Petitioner merely said that he was aware some people considered this to be violation. At that time he did have an opportunity to reconsider his failure to register; however, he remained adamant in his refusal to become a registrant.[3]

2. There is no basis to petitioner's additional contentions that the registration requirement violated his rights under the Free Exercise Clause of the First Amendment and the Due Process Clause of the Fifth Amendment. Registration is a reasonable requirement for the orderly and efficient administration of the Selective Service process. The statutory scheme does not impinge in any substantial manner on the exercise of petitioner's religious beliefs. Compliance with the duty of registering is merely a preliminary step to claiming conscientious objector classification. It does not interfere with one's religion to provide that he claim the exemption in the manner provided by statute. *Richter* v. *United States, supra; United States* v. *Henderson,* 180 F.2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; and *Warren* v. *United States,* 177 F.2d 596 (C.A. 10), certiorari denied,

[3] Petitioner makes no showing that, where there is a firm determination by the accused not to register, there is a mandatory duty on Selective Service to mail SSS Form 392, prescribed by the Director of Selective Service for notifying nonregistrants of their duty to register (Pet. App. 8–9). It should also be noted that the procedural directive of the Director (Pet. App. 10) indicates that the purpose of the issuance of SSS Form 392 was to advise discharged servicemen of their obligation to register following military service, thus covering a factual situation not involved in the instant case.

338 U.S. 947. See also *United States* v. *O'Brien*, 391 U.S. 367, 377.[4]

3. Finally, petitioner's belated argument concerning the admissibility at trial of certain of his statements to investigating officers is without merit. When petitioner was questioned by F.B.I. agent Echols, he had not been "[taken into] custody or otherwise deprived of his freedom of action in any significant way" (*Miranda* v. *Arizona*, 384 U.S. 436, 444). Thus, the *Miranda* warnings were not then an essential prerequisite to the questioning. See, *e.g.*, *Noland* v. *United States*, 380 F.2d 1016, 1017 (C.A. 10), certiorari denied, 389 U.S. 945; *United States* v. *Holmes*, 387 F.2d 781, 785 (C.A. 7), certiorari denied, 391 U.S. 936; *United States* v. *Kroll*, 402 F.2d 221, 223 (C.A. 3), certiorari denied, 393 U.S. 1043. Nevertheless, petitioner was given the warnings as soon as he said he was not registered.[5] Moreover, as the court below held, "the substance of the statements was repeated in [petitioner's] own trial testimony" (Pet. App. 2). His counsel raised no

[4] Petitioner's suggestion that involuntary registration by Selective Service would have been a proper alternative to compulsory registration (Pet. 17) is without substance. Had he been involuntarily registered, he would have had to apply for conscientious objector status just as if he had been a voluntary registrant. Thus, he still would have had to act within the Selective Service System.

[5] The information petitioner later gave to deputy marshal Bagley (Pet. 19, n. 16), concerning his date and place of birth and his current residence, does not suggest, even if we assume no *Miranda* warnings were then given, a basis for further review. This information was readily available from independent sources and thus cannot be deemed incriminating.

objection on *Miranda* grounds before or during trial and declined the trial court's offer to hold a *Jackson* v. *Denno* (378 U.S. 368) hearing to determine the voluntariness of petitioner's statements (R. 2, 3). In view of these circumstances, the court below was justified in declining to decide the *Miranda* question on its merits, and in holding that the admission of the statements was not plain error affecting petitioner's substantial rights under Rule 52(b), F.R. Crim. P.[6]

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

OCTOBER 1970.

[6] *United States* v. *Casias*, 306 F. Supp. 166 (D.Col.), relied upon by petitioner (Pet. 19), involved a "unique" factual situation not present here. There the local board called the accused to a special meeting to elicit specific information from him in aid of a pending prosecution of which he was unaware.